

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLUMBIA SNAKE RIVER
IRRIGATORS ASSOCIATION,
individually and on behalf of the
System 1 Project Participants,

Plaintiff,

v.

UNITED STATES BUREAU OF
RECLAMATION; ESTEVAN
LOPEZ, in his official capacity as
Commissioner for the US Bureau of
Reclamation; and LORRI LEE, in her
official capacity as Pacific Northwest
Regional Director the US Bureau of
Reclamation,

Defendants.

NO: 4:15-CV-5039-RMP

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION

BEFORE THE COURT is Defendants' Motion to Dismiss for Lack of

Subject Matter Jurisdiction, ECF No. 7. The Court has reviewed the record and the
pleadings and is fully informed.

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1 BACKGROUND

2 This case concerns the future of the Columbia Basin Project (“CBP”), a
3 Bureau of Reclamation (“BOR”) water development project in Central Washington
4 State. The largest of its kind, the CBP encompasses 1,029,000 acres, is a crucial
5 element of Washington agriculture, and dates back to the 1930s. Plaintiff in this
6 matter, the Columbia Snake River Irrigators Association (“CSRIA”), is a
7 Washington nonprofit corporation representing the interests of a number of
8 irrigators in the CBP-covered region. There are three districts currently receiving
9 BOR water, and the one that is relevant to the present action is the East Columbia
10 Basin Irrigation District (ECBID). ECBID has a relationship with the BOR that
11 has been built over decades and is characterized by cooperation and continuing
12 contractual obligations.

13 Irrigators have long relied on groundwater permits to supply their
14 agricultural needs in an area now referred to as the Odessa Groundwater
15 Management Subarea (“Odessa”). In the late 1960s, the Washington State
16 Department of Ecology (“Ecology”) recognized the risk of significant harm to the
17 region if the wells there are depleted without a substitute source of water. In light
18 of that risk, Ecology, along with the BOR and the relevant irrigation districts,
19 actively sought out alternatives to provide surface water to the region.

20 There is no dispute over the importance of the CBP’s future and of the dire
21 consequences of a failure to remedy the impending depletion of a crucial source of

1 irrigation water. In light of these concerns, the three affected irrigation districts,
2 the BOR, and Ecology entered into a Memorandum of Understanding in 2004,
3 thereby committing to study the environmental impacts of replacing well sources
4 with surface water. In 2012, the BOR and Ecology issued their findings in a Final
5 Environmental Impact Study and set out with the goal of pursuing viable
6 alternatives to depleting wells. *See also*, ECF No. 8-1 (Amended Record of
7 Decision).

8 After conducting significant research and analyses, CSRIA submitted a
9 proposal to the BOR and Ecology, the “System 1 Proposal,” which they believe
10 represents the only viable and efficient way to advance the goals of all parties
11 interested in the future of irrigation in the Odessa region. The nature of the BOR
12 and Ecology’s responses are the subject of the dispute in this case. CSRIA
13 contends that the responses are a “final decision” of the BOR and subject to
14 judicial review. The BOR denies that the responses amounted to a “final
15 decision.”

16 CSRIA argues that it has “made every reasonable attempt to work
17 collaboratively with the agencies,” ECF No. 1 at 12, that it “reached agreement”
18 with Ecology that their plan was legal, *id.*, and that the BOR has only responded
19 with what CSRIA repeatedly refers to as “arbitrary and capricious” conduct. On
20 March 5, 2015, the BOR sent Plaintiff a letter detailing concerns about the viability
21 of its proposal, stating:

1 As we have communicated, a large portion of the land participating in
2 CSRIA's System 1 Project does not meet Program eligibility criteria.
3 If you desire to continue your efforts we encourage you to adhere to the
4 eligibility criteria established by all agencies for program
implementation. To that end, we encourage you to work in
5 collaboration with the ECBID, to provide your infrastructure
suggestions so that they can be coordinated with District efforts and
operation and maintenance of transferred Project works which will
require ECBID's and Reclamation's acceptance.

6 ECF No. 8-9 at 2.

7 Plaintiff interpreted this letter as final agency action subject to judicial
8 review and communicated its interpretation of the letter as a "final denial" by letter
9 on March 16, 2015. *See* ECF No. 8-10. Despite Defendants' letter sent two days
10 later clarifying that the March 5th letter was not intended to serve as a final denial,
11 ECF No. 8-11, Plaintiff urges this Court to consider the BOR's March 5, 2015,
12 letter as a final denial and to allow Plaintiff to proceed with this suit. In addition,
13 Plaintiff argues that "Bureau's response to the System 1 Project is motivated in
14 material part by improper political interference from proponents of the District's
15 competing project," *id.* at 23, that the BOR's actions are arbitrary and capricious,
16 and that Court intervention is therefore necessary.

17 Plaintiff seeks two primary forms of relief from this Court: (1) a declaratory
18 judgment correcting the BOR's purported errors of law that it uses to justify its
19 hesitation to accept CSRIA's proposal, and (2) an order setting aside the BOR's
20 determinations and finding that agency action has been wrongfully withheld. *See*
21 generally ECF No. 1. Importantly, Plaintiff recognizes that it is not entitled to a
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1 contract with the BOR, but argues that it is entitled to an order mandating that the
2 BOR “exercise their contracting discretion in a manner which is not arbitrary,
3 capricious and contrary to law.” ECF No. 12 at 3.

4 Defendants contend that this case is not justiciable because there is no case
5 or controversy and Plaintiff is seeking an advisory opinion; that the United States
6 has not waived sovereign immunity in this matter; and that this case is not ripe for
7 adjudication because there is no final order by the BOR.

8 ANALYSIS

9 “Once challenged, the party asserting subject matter jurisdiction has the
10 burden of proving its existence.” *Robinson v. United States*, 586 F.3d 683, 685,
11 (9th Cir. 2009) *citing Rattlesnake Coal v. E.P.A.*, 509 F.3d 1095, 1102 n.2 (9th
12 Cir. 2007). Even if this Court has subject-matter jurisdiction under a statutory
13 grant, the federal government cannot be sued unless it has expressly consented to
14 suit. *Dunn & Black P.S. v. United States*, 492 F.3d 1084, 1087-88 (9th Cir. 2007).
15 Consent to suit, or waiver of sovereign immunity, cannot be implied, must be
16 unequivocally expressed, and must be strictly construed in favor of the sovereign.
17 *Dunn & Black*, 492 F.3d at 1088; *Lane v. Pena*, 518 U.S. 187, 192 (1996).

18 Jurisdictional challenges made pursuant to FED. R. CIV. P. 12(b)(1) can be
19 either facial, confining the court’s inquiry to allegations in the complaint, or
20 factual, wherein the court considers evidence beyond the complaint. See *Savage v.*
21 *Glendale Union High Sch., Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1040 n.2
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1 (9th Cir. 2003). “Once the moving party has converted the motion to dismiss into
2 a factual motion by presenting affidavits or other evidence properly brought before
3 the court, the party opposing the motion must furnish affidavits or other evidence
4 necessary to satisfy its burden of establishing subject matter jurisdiction.” *Id.*
5 (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)).

6 In this case, there is a factual issue relevant to the issue of ripeness and
7 jurisdiction: whether the BOR’s March 5, 2015, letter is a final action subject to
8 judicial review. The parties have submitted evidence beyond the complaint to
9 support their relative positions on this issue, and Plaintiff relies on a number of
10 bases to support the Court’s jurisdiction in this case while refuting any
11 applicability of the BOR’s sovereign immunity.

12 First, Plaintiff cites to the Administrative Procedure Act, 5 U.S.C. § 702
13 (“APA”), and argues that the APA waives sovereign immunity where the claims
14 are “not for money damages, no adequate remedy may be found in any other
15 statute and the claims do not seek relief expressly or impliedly forbidden by
16 another statute.” See ECF No. 1 at 3. Plaintiff also argues that 43 U.S.C. § 390uu
17 supports a finding of waiver that would allow this Court to “adjudicate, confirm,
18 validate, or decree” the contractual rights of the parties herein. *Id.* (citing 43
19 U.S.C. § 390uu).

20 The APA allows judicial review of a case where a plaintiff suffers “legal
21 wrong because of agency action, or [is] adversely affected or aggrieved by agency

1 action within the meaning of a relevant statute.” 5 U.S.C. § 702. The section of
2 the statute in 5 U.S.C. § 704 clarifies that “[a]gency action made reviewable by
3 statute and final agency action for which there is no other adequate remedy in a
4 court are subject to judicial review.” Therefore, finality is a jurisdictional
5 requirement to obtaining judicial review under the APA. *See Fairbanks N. Star*
6 *Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 591 (9th Cir. 2008). The
7 Ninth Circuit has clarified that in assessing whether or not an agency “action” is
8 sufficiently final, the courts shall “look to whether the action ‘amounts to a
9 definitive statement of the agency’s position’ or ‘has a direct and immediate effect
10 on the day-to-day operations’ of the subject party, or if ‘immediate compliance
11 [with the terms] is expected.’” *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 465
12 F.3d 977, 982 (9th Cir. 2006) (quoting *Indus. Customers of NW Utils. v. Bonneville*
13 *Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005)).

14 Plaintiff asserts that the BOR’s letter dated March 5, 2015, was final agency
15 action because it was a denial of the System 1 Proposal that resulted from the
16 BOR’s misinterpretations of relevant laws. However, the BOR’s March 5th letter
17 does not have a “direct or immediate effect on the day-to-day operations” of the
18 Plaintiff. *See id.* The plain terms of the March 5th letter signal that no final agency
19 action was taken as of March 5, 2015. After reviewing the significant filings in
20 this case, the Court concludes that there is no final agency action by the BOR
21 subject to judicial review.

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1 The communications between the BOR and CSRIA are characterized by the
2 Bureau's numerous attempts to proceed while also stating its concerns regarding
3 the viability of the System 1 Proposal in the precise manner that it was presented
4 by CSRIA. Despite Plaintiff's characterizing these efforts as arbitrary and
5 capricious attempts to "wait until the Odessa Subarea returns to natural desert
6 before acting," ECF No. 12 at 10, the record instead demonstrates an agency's
7 good faith attempts to adhere to a complex statutory scheme while proceeding with
8 a necessary irrigation project. For example, the BOR's concerns regarding state
9 water rights have been validated by the Washington State Attorney General's
10 office, whose attorney representative is uniquely qualified to advise the BOR on
11 the requisite state water permits applicable to the Odessa projects.

12 Furthermore, the concerns that the BOR has raised have not yet resulted in a
13 final decision, and the plain language of the March 5th letter demonstrates that the
14 BOR stands ready and willing to proceed with proposed projects that adhere to
15 proper protocols in line with Ecology's recommendations. It is not the role of the
16 judiciary to step into the middle of the BOR's deliberative process and to question
17 the concerns they raise in weighing different options to address a dire need that is
18 completely within the purview of their expertise. *See Ecology Ctr., Inc. v. United*
19 *States Forest Serv.*, 192 F.3d 922, 924 (9th Cir. 1999) ("Courts are generally
20 precluded, under the ripeness doctrine, from prematurely adjudicating
21 administrative matters until the proper agency has formalized its decision making

process.” (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967))). Plaintiff may be correct that no additional environmental analysis is necessary, or that necessary water law permits (which Plaintiff has not yet obtained) may eventually be issued to allow a similar plan to occur, but those issues are not yet reviewable by this Court. The Court will not question the intermediate steps that the BOR takes as it moves toward selecting a plan that will serve irrigation needs while complying with statutory requirements.

Pursuant to 5 U.S.C. § 706(1), Plaintiff also asks this Court to “compel agency action unlawfully withheld or unreasonably delayed.” *See ECF No. 1 at 28.* Despite citing case-law for standards applicable to § 706(1) claims, Plaintiff fails to provide any authority supporting its argument that the BOR has unlawfully withheld or delayed action simply because it will not accept the System 1 Proposal as offered, and as quickly, as CSRIA would like.

Additionally, the APA does not allow judicial review of actions that are “committed to agency discretion by law.” *See 5 U.S.C. § 701(a)(2).* Regarding “water service contracts,” 43 U.S.C. § 485(h)(e) provides:

In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes.

43 U.S.C. § 485(h)(e). The determination of whether agency action has been “committed to agency discretion by law” has been narrowly interpreted so that it

1 deprives the court of jurisdiction to review agency actions only in those rare
2 instances ‘where statutes are drawn in such broad terms that in a given case there is
3 no law to apply.’ *Strickland v. Morton*, 519 F.2d 467, 468 (9th Cir. 1975) (quoting
4 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

5 Plaintiff misconstrues Defendants’ argument that there is no law to apply to
6 review the BOR’s contracting decisions when it argues that this Court should apply
7 the laws that the BOR is allegedly misinterpreting. *See* ECF No. 12 at 6-7. The
8 relevant inquiry is whether or not there is law to limit the BOR’s discretion in
9 negotiating a contract regarding the System 1 Proposal and choosing a course of
10 action for the Odessa irrigation issues. *See Strickland*, 519 F.2d at 468. Plaintiff
11 does not provide any such law and there is no applicable standard to assess the
12 validity of the BOR’s actions. This Court will not step into the province of the
13 BOR to supplant its own judgment for that of an agency still considering the best
14 course of action in a complex arena.

15 Plaintiff also cites to 43 U.S.C. § 390uu to establish that the BOR has
16 waived sovereign immunity. In relevant part, § 390uu states that “[c]onsent is
17 given to join the United States as a necessary party defendant in any suit to
18 adjudicate, confirm, validate, or decree the contractual rights of a contracting entity
19 and the United States regarding any contract executed pursuant to Federal
20 reclamation law.”

1 The U.S. Supreme Court has interpreted § 390uu, holding:

2 This language is best interpreted to grant consent to join the United
3 States in an action between other parties—for example, two water
4 districts, or a water district and its members—when the action requires
5 construction of a reclamation contract and joinder of the United States
6 is necessary. It does not permit a plaintiff to sue the United States alone.

7 *Orff v. United States*, 545 U.S. 596, 602 (2005).

8 Under *Orff*, waiver of sovereign immunity pursuant to § 390uu can only be
9 established when the government is a necessary party to a lawsuit and where
10 contractual privity exists between the United States and a plaintiff. *Id.* Apparently
11 not recognizing the deficiencies of its argument, Plaintiff seeks leave to implead
12 ECBID to enable § 390uu to provide jurisdiction over this case. *See* ECF No. 12 at
13 16-17. However, even if Plaintiff was allowed to amend the complaint, there
14 would not be a waiver of sovereign immunity under § 390uu. This statute is
15 inapplicable here because there is no contract between Plaintiff and the United
16 States, and Plaintiff has not established its right to one. The statute is intended to
17 enable the government to be added into a case between two parties that are in
18 contractual privity when the government is a necessary party due to its
19 involvement in that contract. The statute does not reference waiving sovereign
20 immunity to allow a plaintiff to have its rights declared when it has simply
21 proposed a contract and takes issue with the government's less-than-enthusiastic
 response.

1 In examining the justiciability factors of this case, the Court notes that
2 Plaintiff asserts standing to “vindicate environmental interests in efficient
3 Columbia River water use.” ECF No. 1 at 4. To establish standing, Plaintiff must
4 have suffered an “injury in fact” that is “fairly traceable to the challenged action of
5 the defendant” and “that it be likely, as opposed to merely speculative, that injury
6 will be redressed by a favorable decision.” *See Lujan v. Defs. of Wildlife*, 504 U.S.
7 555, 560-61 (1992). By Plaintiff’s own admission, “CSRIA merely seeks
8 declarations correcting defendant’s serious errors of law and contract construction,
9 and remanding the ultimate contracting decision for consideration in accordance
10 with the law.” ECF No. 12 at 20. Plaintiff’s own characterization of its claims
11 calls into doubt whether or not Plaintiff has or will suffer an injury in fact that
12 could be redressed by a Court’s declaration directing the BOR to use its discretion
13 lawfully.

14 Plaintiff brought four different claims pursuant to the Declaratory Judgment
15 Act, 28 U.S.C. § 2201, requesting that this Court hold that the BOR has erred in its
16 interpretations of laws relevant to the System 1 Proposal. *See* ECF No. 1 at 24-27.
17 “The Declaratory Judgment Act, 28 U.S.C. § 2201, does not itself confer federal
18 subject matter jurisdiction.” *Fid. & Cas. Co. v. Reserve Ins. Co.*, 596 F.2d 914,
19 916 (9th Cir. 1979) (citing *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667 (1950)).
20 “It has always been, and now is, essential to the maintenance of a declaratory relief
21 action that there be an actual controversy in existence.” *Garcia v. Brownell*, 236

1 F.2d 356, 357 (9th Cir. 1956); *see also* U.S. CONST. art. III, § 2, cl. 1. The
2 Declaratory Judgment Act simply provides an additional remedy where jurisdiction
3 already exists. *See* 28 U.S.C. § 2201. In light of this Court's finding that it lacks
4 jurisdiction over Plaintiff's claims, its request for declaratory judgments are
5 likewise denied.

6 Accordingly, **IT IS HEREBY ORDERED** that Defendants' Motion to
7 Dismiss for Lack of Subject Matter Jurisdiction, **ECF No. 7**, is **GRANTED**.

8 The District Court Clerk is directed to enter this Order, provide copies to
9 counsel, and **close this case**.

10 **DATED** this 2nd day of February 2016.

11
12 *s/ Rosanna Malouf Peterson*
13 ROSANNA MALOUF PETERSON
United States District Judge
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